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DEC 19 2003

OFFICE OF PETITIONS

In re Application of :
Hawkins, et al. :
Application No. 10/044,449 :
Filed: January 10, 2002 :
Attorney Docket No. 42390P12818 :
ON PETITION

This is a decision on the petition to revive under 37 CFR 1.137(a), filed December 8, 2003 (Certificate of Mailing dated December 5, 2003).

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." As the petition fee has already been paid, there is no further fee for a renewed petition.

The above-identified application became abandoned for failure to timely file a reply to the Notice to File Corrected Application Papers, mailed February 11, 2002, which set an extendable period for reply of two months for applicant to file substitute drawings. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, no reply to the Notice to File Corrected Application Papers having been received, the above-identified application became abandoned on April 12, 2002. A Notice of Abandonment was mailed on November 24, 2003.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks items (1) and (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

With regards to item (3), petitioner contends that he never received the Notice to File Corrected Application Papers. Petitioner has not met the showing required to establish nonreceipt of an Office action. In addition to stating that an Office action was not received, a practitioner must attest to the fact that a search of the file jacket and docket records indicates nonreceipt. Furthermore, a practitioner must include a copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed.³ For example, where an Office action sets a period for reply of two months, "a copy of the docket report showing **all** replies docketed for a date [two months] from the mail date of the nonreceived [Office action] must be submitted as documentary proof of nonreceipt of the [Office action]."⁴ Here, petitioner has not submitted a copy of a docket record.

With regards to item (1), petitioner has not submitted substitute drawings. A copy of the Notice to File Corrected Application Papers is enclosed for petitioner's convenience.

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ See MPEP 711.03(c) (II).

⁴ Id (emphasis added).

If petitioner can not meet the showing required to establish non receipt of the Notice to File Corrected Application Papers, petitioner may file a petition to revive pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries should be directed to the undersigned at (703) 305-0272.

Cliff Congo

Cliff Congo
Petitions Attorney
Office of Petitions

Enc: Office action mailed February 11, 2002 (1 page)